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MEDICAL ERROR – CIVIL LIABILITY FOR THE DAMAGE

ABSTRACT: The paper analyzes the civil law aspects of the responsibility of medical workers and institutions due to the damage caused by the doctors` mistakes in providing medical care. The aim of this paper is to present all the basics of physician responsibility, if it is established that there is a close connection between the error and the proven error and damage caused to the health of the patient, but also to third parties. The issue of medical error is not exclusively related to compensation for damages, since it heavily relies on medical law too. Although mistakes are mainly caused by the wrong actions of the doctors in performing their professional activities, the paper also deals with the responsibility of medical institutions for the damage being caused. An inaccurate definition of the legal nature of doctors' responsibilities, obligations imposed on medical workers by law, the definition of errors in a medical treatment, as well as the legal basis of liability to third parties, indicate that there are many not only legal but also ethical and moral dilemmas requaring the additional attention and analysis, which is also the goal of this paper.

Keywords: *medical error, civil liability, ethics, damage, patients' rights, civil rights, medical facilities.*

1. Introduction

The development of modern medicine has undoubtedly had a great impact on reducing the risk of disease, however, at the same time the increased risk of error is caused not only by errors of professional medical staff but also

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by procedures that become increasingly complex and therefore more risky for the patient and his health. The era of modern medicine begins in the 19th century, which is characterized by a new approach to treatment with the use of modern medical means in diagnosis and treatment. This results in a change in the doctor-patient relationship. Instead of a personal relationship where the patient blindly believed in the knowledge, skills and abilities of doctors, depersonalization occurs, so today instead of local doctors who knew their patients by name and followed the history of hereditary diseases through generations, we have doctors who "blindly" follow medical techniques. and procedures, which entails a higher risk of error.

Official United Nations statistics provide reliable evidence that life expectancy has been significantly extended in almost all countries in a very short period of time.[1] There is no doubt that the development and progress of medicine has greatly contributed to this. The main purpose and goal of modern medicine is to protect the life and health of citizens, which is possible only if quality treatment is provided and all the achievements of modern medicine are adopted. If we take into account the number of inhabitants, which is constantly growing, and their needs in terms of health care, it is logical that the chance of a doctor making a mistake in that case grows exponentially. According to some scientific analyzes, "in the United States, the mistakes of doctors are the third leading cause of death in patients who are treated in hospitals, and that number ranges from 210,000 to 400,000."[2] Some even estimate that the number is 1.5 million patients a year,[3] while the "Legal and Economic Literature" speaks of a real "medical responsibility industry" that produces a cumulative annual expenditure in the United States on various bases of 17 to 29 billion dollars a year, according to report of the American Institute of Medicine."[4] Actions and omissions that can harm the patient are numerous and in accordance with the provisions of the Law on Obligations

[1] On the official website of the United Nations, it can be seen that in the period from 2010 to 2020, the life expectancy of the population in Serbia increased from 76.2 to 78.4 years for women, and from 70.8 to 73.2 years for men. In such a short period of ten years, the increase in the average life expectancy by 2.2, ie 2.6 years, is an incredible progress, so the question can rightly be asked what the real limit of life expectancy is. (13. August 2020.). Available at: https://data.un.org/en/iso/rs.html

[2] Makary, M. A., Daniel, M. (2016). Medical error-the third leading cause of death in the US. *Bmj*, 353. p. 2.

[3] Arlen, J. (2013). Economic analysis of medical malpractice liability and its reform. In: *Research handbook on the economics of torts*. Edward Elgar Publishing. p. 40.

[4] Vojković, H. (2019). Građanskopravna odgovornost za povredu medicinskog standarda i prateći ekonomski učinci. [Civil liability for violation of the medical standard and accompanying economic effects]. *Zbornik Pravnog fakulteta Sveučilišta u Rijeci, 40* (2), p. 698.

of the Republic of Serbia,[5] each type of causing damage creates an obligation of the one who caused it and to compensate it, unless he proves that it occurred without his fault (Art. 154 ZOO). This right to compensation for damage caused by a professional error of a healthcare worker is also one of the basic rights of patients and is stated in Article 31 of the Law on the Rights of Patients of the Republic of Serbia from 2013.

2. Medical error – concept

The mistakes and omissions of doctors have always existed, and therefore their responsibility for the consequences. There are numerous historical writings and laws that testify to strict rules and sanctions for cases of medical errors. Thus, for example, the Hammurabi Code, which is the "most important legal text of the Old East",[6] contains strict sanctions for perpetrators of criminal acts. This, of course, also referred to doctors who would cause damage to someone's body during a medical procedure. Article 218 of Hammurabi's law states the following: "If a doctor inflicts a severe wound on someone with a bronze knife and kills him, or opens someone's eye and destroys him, his hands should be cut off", Article 226 provides sanctions for the surgeon's mistakes: "If a surgeon without the knowledge of the master of the slave imprints the slave sign of an inalienable slave, that surgeon's hands should be cut off ".[7]

Hippocrates, the "Father of Medicine" and the creator of the famous Hippocratic Oath, states in the book on epidemics the ethical principle: "help but without injury" (originally: *Ofeleein i mi vlaptein*), which inspires the most famous Greek physician-philosopher in the Roman Empire Claudius Galen (Κλαύδιος Γαληνός) to define the principle: Primum non nocere – first not to harm, as the most important ethical principle of ancient medical practice, where the doctor should act exclusively in the interest of his patient.[8]

In the middle of the nineteenth century, for the first time in theory, medical error was defined by Rudolf Ludwig Karl Virchow, a German politician and scientist, the founder of social medicine. "He defined a professional

[5] Zakon o obligacionim odnosima. [The Law of Contract and Torts]. *Sl. list SFRJ*, br. 29/78, 39/85, 45/89 – odluka USJ i 57/89, *Sl. list SRJ*, br. 31/93 i *Sl. list SCG,* br. 1/03 – Ustavna povelja.

[6] Babić, I., (2008). Osnovi imovinskog prava – Uvod u građansko pravo i stvarno pravo, [Fundamentals of property law – Introduction to civil law and property law]. Beograd, Službeni glasnik, p. 41.

[7] Radišić, J. (2008). Medicinsko pravo, [Medical law]. Beograd, Izdavačko preduzeće Nomos, pp. 191-192.

[8] See: (24. August 2020.). Available at: https://en.wikipedia.org/wiki/Primum_non_nocere

medical error as: violation of the generally accepted rules of performing treatment due to lack of necessary attention or caution."[9] The term "professional error" was also adopted by the Law on Health Care of the Republic of Serbia. Some German authors dispute this definition, arguing that medical skill cannot be turned into a rigid dogma, nor can a breach of duty by a doctor be unconditionally called a "professional error." Instead, according to them, it would be more correct to speak of "involuntary harm", of "neglect of due care" or of "error of treatment".[10] The legal definition also does not give a complete answer to the question what is a medical error, and what is a medical omission, and is there a doctor's responsibility in the case of an error as well?

Professional error, in terms of the Law on Health Care of the Republic of Serbia, means negligent treatment, i.e. neglect of professional duties in providing health care, i.e. non-compliance or ignorance of established rules and professional skills in providing health care, which lead to violations, deterioration, injury, loss or damage to the health or body parts of the patient. (Article 197, paragraph 3) Professional error is determined in the disciplinary procedure before the competent body of the chamber, i.e. in the procedure of regular and extraordinary external inspection of the quality of professional work of health workers. (Article 197, paragraph 4)

A medical error, therefore, is the conduct of a negligent doctor contrary to the rules of the profession (contra legem artis) in the form of a gross violation of medical standards. The question is: what is the basis of a doctor's responsibility?

3. Basis of responsibility

Legal liability can be contractual and non-contractual, depending on whether the cause of damage is an independent source of obligations (in case of tort) or the damage occurred due to non-fulfillment of obligations under the contract and then its termination (contractual liability). The specificity of a medical error is that it always occurs on the basis of guilt. In Serbian legislation, liability for damages derives from the provisions of the Law on Obligations and the mentioned Article 154. When we talk about the basis of liability, it is important to note that, unlike criminal liability, civil liability is

[9] Počuča, M., Šarkić, N., Mrvić Petrović, N. (2013). Lekarska greška kao razlog pravne odgovornosti lekara i zdravstvenih ustanova, [Medical error as a reason for legal responsibility of doctors and health institutions]. Beograd, Vojnosanitetski pregled, p. 208.

[10] Radišić, J. (2008). Medicinsko pravo, [Medical law]. Beograd, Izdavačko preduzeće Nomos, p. 180.

characterized by a plurality of basis. Thus, in civil law, instead of a single basis of responsibility, we can talk about more of them on the basis of guilt (in terms of subjective responsibility), on the basis of causing damage, regardless of guilt (in terms of objective responsibility) and on the basis of equity.

The specificity of medical error is that it is always based on guilt. The doctor will be liable only when his medical intervention is wrong and if his direct guilt that caused the damage is established. This principle is related to all employees who deal with the so-called. "Free professions" such as: doctors, lawyers, engineers, architects ... "The main goal of this concept is to provide them with freedom of action and decision-making, and at the same time to be released from responsibility provided they adhere to the code of ethics, act according to rules of the profession and with due care."[11] Unlike most other professions, if performing a medical profession as a result of death or impairment of health, the responsibility of the doctor will not be automatically withdrawn. The death of patients and the deterioration of health that occur during medical interventions are not basic illegalities because the human body is so specific that despite its technological progress in the field of medicine, it is still impossible to predict the outcome of treatment and medical intervention with absolute certainty. For that reason, the Laws stipulate that the responsibility of a doctor arises exclusively due to negligent behavior contrary to the rules of the medical profession and standards.

The doctor's responsibility exists only when his intervention is wrong and when he is to blame for it. So, it is enough that the doctor made a mistake that could have been avoided if he had acted conscientiously, so that his responsibility and obligation to compensate the damage would have arisen. However, if the doctor adheres to the procedures and medical standards, any negative outcome of the treatment remains legally flawless.

Serious forms of violation of medical activity are criminal offenses related to the medical profession, regulated by the Criminal Code of the Republic of Serbia, Article 251. The act of performing negligent medical care consists in the activity of a doctor who appropriate hygienic measures or acts obviously unscrupulously in general and thus causes a deterioration of a person's health. Apart from doctors, paragraph 2 of the same article of the Criminal Code also provides sanctions for other health workers who, when providing medical assistance or care or performing other health activities, obviously act unscrupulously and thus cause a worsening of their health condition.

[11] See: Laufs, A., Uhlenbruck, W., (2002). Handbuch des Arztrechts, 3. neubearbeitete Auflage. C.H. München, Becksche Verlagsbuchhandlung, p. 23.

In relation to civil liability, where it is sufficient to establish that the medical intervention was wrong and that the doctor is guilty of it, a gross or serious error is required in criminal liability. Therefore, minor omissions of the doctor during the diagnosis and selection of the treatment are only a small deviation from the rules of medical practice and are not subject to criminal prosecution. A serious and conspicuous mistake of a doctor should be easily provable in court, however, the expert decides on medical issues, and the judge on legal issues. "A judge may not accept a medical expertise only if he is not convinced of its validity. If the judge does not accept the expertise, he must explain his different belief and state on which his own knowledge of the matter that belief is based."[12] In professions such as medicine, there is an "unwritten code of conduct" not to be an expert witness directly against a colleague despite the expert's obligation to be objective, conscientious and obliged to tell the truth. The expert's finding does not have to be wrong, but an expert involved can always mitigate and skillfully conceal the responsibility of his colleague. Although the court is not obliged to accept the expert's opinion and finding, in most cases it will take them into account because there is no other possibility to obtain an expert opinion that only experts have.

4. Medical error and damage – cause and effect relationship

As explained in the previous part of the paper, what is meant by a medical error, in order to determine the causal relationship, it is necessary to determine the legal concept of damage in terms of damage to legal goods that are recognized by law.

In legal theory, damage is usually understood as "a violation of someone's subjective right or legally protected interest caused by a harmful act."[13] It is a common practice not to specify the definition of damage in civil codes, and this is also the case in Serbian law. Article 155 of the Law on Obligations stipulates that damage is the reduction of someone's property (ordinary damage) and the prevention of its increase (lost benefit), as well as causing physical or mental pain or fear (non-material damage) to another. "The Law on Obligations included among its basic principles the prohibition of causing damage and the duty to fulfill obligations. Violation of these principles leads

[12] Radišić, J., op. cit., p. 321.

[13] See: Blagojević, B., Krulj, V. (1983). Komentar Zakona o obligacionim odnosima, [Commentary on the Law of Obligations]. Beograd, Savremena administracija, p. 513.; Šćepanović, G., Stanković, Z., Petrović, Z., i saradnici (2011). Sudskomedicinsko veštačenje nematerijalne štete, [Forensic Medical Expertise of Non-pecuniary Damage]. Beograd, JP Službeni glasnik, p. 502.

to damages and civil liability for damages. The obligation to compensate for the damage arises from the very act of causing the damage. Compensation for damages is, in fact, a civil sanction for causing damage."[14]

In order for a claim for damages to be well-founded, it is necessary to determine the relationship between the medical error and the damage. A medical error should be a conditio sine qua non of the damage caused. If the damage would not have occurred without a medical error, we can say that there is a causal relationship between them and that the doctor's error had a direct consequence of the damage. If, on the other hand, the damage would certainly occur unrelated to the doctor's wrongdoing, then one cannot speak of the existence of causality. "The doctor is obliged to compensate the damage only if it is proven that the application of another method of treatment or another drug would not cause the same damage."[15] According to Radisic, "the doctor is liable only for the damage that could be prevented or avoided by proper treatment; there is no liability for imminent damage."[16]

The causes of damage to a patient's health can be numerous and varied. Also, doctors' mistakes can have various consequences, which, as a rule, do not have to be exclusively harmful. The occurrence of damage after a medical error is not proof of a causal link, so the burden of proving the existence of a causal link between a medical error and the damage caused to the plaintiff. In practice, however, proving a causal link is extremely difficult. Therefore, the plaintiff must prove through clues, i.e. indirect evidence. "The causal link is considered established if the patient proves that the doctor made a mistake and that such a mistake, according to the knowledge of medical science and medical experience, typically leads to the damage that has occurred. Then it is up to the doctor to prove that in this particular case this typical causal development did not materialize, but that it was an atypical outcome."[17] In the case of criminal liability of a doctor due to a mistake for liability, it is not enough to determine the causal link on the degree of probability, but there must be greater certainty regarding the doctor's actions and the damage, which is understandable considering the sanctions provided by law.

[14] Radovanov, A. (2009). Obligaciono pravo – opšti deo [Obligation law – general part], Novi Sad, Pravni fakultet za privredu i pravosuđe, p. 263.
[15] Giesen, D. (1981). Arzthaftungsrecht. Die zivilrechtliche Verantwortlichkeit des Arztes in rechtvergleichender Sicht, Bielefeld, p. 14.
[16] Radišić, J., op. cit., p. 203.
[17] Ibid. p. 204.

Whether there is a causal link between the medical error and the damage caused will be assessed by the judge in the civil procedure on the basis of the expert opinion of medical experts, with the obligatory consultation of legal science, ie court practice. However, with his personal conviction, the arbitrator should fill the space that is medically unprovable and which the judge should judge based on the created conviction and personal assessment.

5. Solutions provided for in the positive law of the Republic of Serbia that regulate compensation for damage caused by a medical error

The medical error was originally regulated by the Law on Health Care of the Republic of Serbia from 2005.[18] In the first version of the Law, Article 40 referred to the general norms of the law of obligations regarding the compensation of material and non-material damage in case of a doctor's mistake. However, later amendments to the said Law, and due to the adoption of the Law on Patients' Rights[19] in 2013, these provisions were removed from the legal text, so that currently the Law on Health Care contains only three articles relating to medical (professional) error, while the provisions on compensation of damage to the patient caused by a medical error transferred to the norm of the Law on Patients' Rights. Thus, the mentioned law stipulates in Article 31 that a patient who, due to a professional error of a health worker, i.e. a health associate, suffers damage to his body in the exercise of health care, or causes a deterioration of his health condition by professional error, is entitled to compensation according to general rules on liability for damage. The norms of the law of obligations regarding compensation for damages cannot be excluded or limited in advance.

These concise legal norms do not contain detailed provisions on the conditions, procedure and types of compensation for injured patients, but only refer to general provisions on causing damage, regulated by the Law on Obligations.

The request for compensation of damage is also the "most common request that arises after a medical error and compensation for material damage, which is not disputable at all."[20] However, the question arises as to whether the right to compensation for non-pecuniary damage should be recognized

[18] Zakon o zdravstvenoj zaštiti Republike Srbije [Law on Health Care of the Republic of Serbia]. *Sl. glasnik RS*, br. 107/05, 72/09-dr. zakon, 88/10, 99/10, 57/11, 119/12 i 45/13-dr.zakon.

[19] Zakon o pravima pacijenata [The Law on Patients' Rights]. *Sl. glasnik RS*, br. 45/13.

[20] Čubinski, M. (2001). Prava oštećenog i princip naknade štete. [The rights of the injured party and the principle of compensation for damages]. *Arhiv za pravne i društvene nauke*, *86* (4), p. 581.

and, if so, how to determine the amount of damage suffered. In theory and practice, this right is recognized, but the main reason for its introduction is not the establishment of an earlier condition, but a certain property satisfaction that should give the patient some satisfaction as a victim of a medical omission after everything she has experienced.[21]

The Law on Obligations provides for various types of compensation for material damage. One of them is compensation for damage in the form of a monetary annuity, and the Law states in which cases this is possible. Among other things, it is in the case of death, bodily injury or damage to health, when the cash annuity is determined for life or for a certain period of time. "An annuity is a type of compensation awarded in cash so that it is paid periodically or successively through individual installments due."[22] If someone's health is seriously damaged due to a medical error and loss of earnings occurs, "in court practice, such compensation has been recognized, taking the position that compensation for successive loss of earnings in the future is determined in the form of a monthly annuity."[23]

6. Responsibility of the health institution

While physicians and other health care professionals are held liable for omissions and errors in the treatment of patients, health care facilities as legal entities may also be liable. The basis of their responsibility is the improper work of employees. The responsibility of health care institutions is also based on the provisions of the Law on Obligations, Art. 170 to 172. "Article 172 prescribes the responsibility of the state for damage caused by its institution, so that provision would come into consideration when the question of the Military Medical Academy, which performs its activities within the Ministry in charge of defense, is raised."[24] The understanding of the type and nature of this responsibility of the health institution was also given by court practice. "The responsibility of a health institution is subjective, not objective, and it is responsible for the damage caused to the patient if its doctors and other

[21] Professor Obren Stanković is of the opinion that compensation for non-pecuniary damage is not disputable because: "All of them have in common that they mean a certain suffering, a certain pain, an unpleasant feeling for us and as such disturb our emotional or psychological balance. As an instrument of the rational organization of social relations, law cannot remain indifferent to such an abnormal situation, just as it cannot remain indifferent if the balance in our property is disturbed." Stanković, O. (1998). Naknada štete, [Indemnity]. Beograd, Nomos, p. 26.

[22] Radovanov, A. op. cit., p. 271.

[23] Ibid.

[24] Počuča,M., Šarkić, N., Mrvić Petrović, N., op. cit., p. 210.

medical staff did not act in accordance with the rules of the medical profession and with appropriate care, so such behavior results in damage. The civil liability of a health care organization exists only if it is proven that in the given circumstances the doctors and health care staff did not act as they should have."[25]

The responsibility of health care institutions derives from the actions of its employees. "Depending on the type of procedure that is owed in a particular case or procedure, all forms of breach of duty are distinguished: in the form of a treatment error (skill or skill) and in the form of a notification error (warning, information or counseling)."[26] Both forms of responsibility are equal in theory and practice and create a basis for sanctioning the institution.[27]

7. Conclusion

The position of the patient in a civil lawsuit against the doctor is extremely unfavorable, because it is up to the patient to provide all the evidence regarding the existence of a causal link between the doctor's mistake and the damage suffered. This is almost impossible in most cases. Shifting the proving procedure from the patient to the doctor would not solve the problem because it would be extremely difficult for the doctor to prove that the death or severe damage to the patient's health did not occur due to his mistake.

The purpose of compensation for patients who suffer damage due to medical error is to compensate for material and non-material damage caused by the consequences of incorrect treatment. Medical error is determined objectively, by assessing the procedures and procedures that any doctor with average knowledge and professional abilities would apply to a patient. The degree of guilt of the doctor is based on the severity of the mistake and the assessment of the damage to the patient's health. However, civil court protection of patients' rights has proven to be an expensive and inefficient system.

[25] Judgment of the Supreme Court of Serbia, Rev. 1659/84, Taken from: Radovanov, A., Petrović, Z. (2009). Naknada štete – zbornik sudske prakse, [Damages – a collection of case law]. Novi Sad, Pravni fakultet za privredu i pravosuđe, Privredna akademija, p. 99.

[26] Mujović-Zorić, H., Petrović, Z. (2012). Odgovornost zdravstvenih ustanova za štete kao posledice lečenja, [Liability of health care institutions for damages as a consequence of treatment]. *Vojnosanitetski pregled, 69*(8) p. 693.

[27] Judgment of the Supreme Court of Serbia, Rev. 2714/92 of 8 April 1993: "The health institution is liable for the harmful consequences of surgical treatment, if it has not presented to the patient all possible consequences of the surgical procedure to which he or she has otherwise agreed"; Judgment of the Supreme Court of Serbia, Rev. 2066/80: "A health institution that performs a medical intervention may be liable only for those interventions that occur as a result of unprofessional, careless and improper work of its employees ..."

One gets the impression that the overriding goal is to embarrass the doctor rather than to establish the real responsibility of the doctor.

As a safe solution and protection against possible mistakes of doctors, we see in the insurance of professional liability of doctors that covers the legal civil liability of the insured for damages caused by death, injury to body or health, third parties caused by medical error. It allows the patient to be compensated for all types of damage that occur after the wrong medical treatment is provided. This type of insurance covers all harmful events that occur as a result of a doctor's mistake, or negligent or unprofessional procedure or omission of doctors and other medical staff if done contrary to positive legal regulations and medical standards, and as a direct consequence have an unfavorable treatment outcome. to claim damages.

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LEKARSKA GREŠKA – GRAĐANSKOPRAVNA ODGOVORNOST ZA NASTALU ŠTETU

REZIME: U radu su analizirani građanskopravni aspekti odgovornosti medicinskih radnika i ustanova zbog štete nastale usled greške lekara pri pružanju medicinske zaštite. Cilj rada je da se prikažu svi osnovi odgovornosti lekara, ukoliko se utvrdi postojanje uzočne veze između nastale i dokazane greške i štete pričinjene zdravlju pacijenta, ali i trećim licima. Pitanje lekarske greške nije isključivo vezano za naknadu štete, obzirom da se u velikoj meri oslanja i na medicinsko pravo. Iako greške uglavnom nastaju usled pogrešnog postupanja lekara u obavljanju svoje profesionalne delatnosti, rad se bavi i odgovornošću medicinskih ustanova za nastalu štetu. Neprecizno definisanje pravne prirode odgovornosti lekara, obaveza koje pravo nameće medicinskim radnicima, definisanje greške u medicinskom tretmanu, kao i pravni osnovi odgovornosti prema trećim licima, ukazuju na to da postoji veliki broj ne samo pravnih već i etičkih i moralnih dilema koje zahtevaju dodatnu pažnju i analizu, što je ujedno i cilj ovoga rada.

Ključne reči: *lekarska greška, građanskopravna odgovornost, etika, šteta, prava pacijenata, građansko pravo, medicinske ustanove.*

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